UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MICHIGAN

ROBINSON LABORATORIES, INC.,

Plaintiff/Counter-Defendant,

v.

ALS ENTERPRISES, INC.,

Defendant/Counter-Plaintiff.

Case No. 1:01 CV 677

Honorable Robert Holmes Bell

FIRST AMENDED COMPLAINT AND JURY DEMAND

The Plaintiff, Robinson Laboratories, Inc. (hereinafter, "Robinson Labs"), for its Complaint against the Defendant, ALS Enterprises, Inc. (hereinafter "ALS"), alleges as follows:

Nature of Action

1. This action for declaratory judgment of invalidity, unenforceability, and non-infringement involving several U.S. Patents relating to odor-absorbing clothing and owned by ALS, and for damages for breach of contract and fraudulent misrepresentations by ALS under the laws of the State of Michigan.

2. The patents involved in this suit are U.S. Patent Nos. 5,383,236 ("the '236 Patent"), 5,539,930 ("the '930 Patent"), 5,790,987 ("the '987 Patent"), 6,009,559 ("the '559 Patent"), and 6,134,718 ("the '718 Patent") (collectively "the Sesselmann Patents") relating to odor-absorbing clothing. The Sesselmann Patents are owned by ALS and licensed on a non-exclusive basis to Robins n Labs.

3. The claims of the '236, '930, '987, and '559 patents are invalid as anticipated or obvious over prior art relating to odor absorbing and protective clothing.

4. On information and belief, the '236, '930, '987, '559 and '718 patents are also unenforceable because of inequitable conduct by ALS before the U.S. Patent and Trademark Office ("PTO") during prosecution of these applications.

5. The '236, '930, '987, '559 and '718 patents are also unenforceable because of the patent misuse by ALS.

6. The items of odor-absorbing clothing made and sold by Robinson Labs, and on which the Robinson Labs is compelled to pay royalties to ALS, do not infringe the '236 or '718 Patents.

7. Robinson Labs is presently being harmed and suffering damage because it is compelled to pay royalties to ALS to make or sell odor-absorbing clothing using the Sesselmann Patents. Robinson Labs is also being harmed because it is currently forced to pay royalties on items of odor-absorbing clothing that do not infringe the Sesselmann Patents. ALS has sued others who have practiced inventions allegedly covered by the Sesselmann Patents without paying royalties. Robinson Labs has withheld its most recent royalty payment under the agreement, and accordingly, Robinson Labs has a reasonable apprehension that it will face an infringement suit by ALS. Therefore, an actual controversy exists between Robinson Labs and ALS regarding the validity and unenforceability of the patents-in-suit and whether certain of Robinson Lab's products infringe those patents. These matters are, accordingly, ripe for judicial determination in an action for declaratory judgment.

8. ALS has made fraudulent misrepresentations to Robinson Labs and ALS has breached both the implied covenant of good faith and fair dealing and the express terms of the

license agreement between ALS and Robinson Labs. Consequently, Robinson Labs is entitled to recover damages, including royalties accrued prior to the date of this suit.

The Parties

9. Robinson Labs is a corporation existing and incorporated under the laws of the State of Minnesota, with offices at 110 North Park Drive, Cannon Falls, Minnesota, 55009-0018. Robinson Labs is in the business of developing, manufacturing, and selling odor adsorbing apparel and accessories throughout the world, including odor adsorbing apparel manufactured under the Sesselmann Patents under a non-exclusive license from ALS.

10. ALS is a Michigan corporation with is principal place of business at 821 West Western Avenue, Muskegon, Michigan, 49441, and is the assignee of the Sesselmann Patents that were invented by its president, Gregory J. Sesselmann.

Jurisdiction and Venue

11. This Court has subject matter jurisdiction over each of the claims alleged:

A. The patent-related claims in this action arise under the Patent Laws of the United States of America, 35 U.S.C. § 1 *et seq.*, and the Declaratory Judgment Act, §§ 2201 and 2202, and the Court has subject matter jurisdiction over these claims under 28 U.S.C. §§ 1331 and 1338(a).

B. The breach of contract and misrepresentation claims arise under the laws of the State of Michigan, and the Court has supplemental jurisdiction over these claims under 28 U.S.C. § 1367(a) and diversity jurisdiction under 28 U.S.C. § 1332(a).

12. An actual controversy exists between Robinson Labs and ALS concerning the patents-in-suit.

13. This Court has personal jurisdiction over ALS: ALS is domiciled in this district; it regularly transacts business in the State of Michigan; and because it has numerous, substantial contacts with the State of Michigan in connection with the actions and events alleged herein.

14. Venue is proper in this judicial district under 28 U.S.C. § 1391(b).

The Licensed Patents-In-Suit

15. U.S. Patent No. 5,383,236, entitled "ODOR ABSORBING CLOTHING" issued from the PTO on January 24, 1995, to ALS as assignee from Sesselmann, with claims directed to, *inter alia,* articles of clothing that absorb odors. A copy of the '236 Patent is attached hereto as Exhibit A.

16. U.S. Patent No. 5,539,930, entitled "SYSTEM AND METHOD FOR ODOR ABSORPTION" issued from the PTO on July 30, 1996, to ALS as assignee from Sesselmann, with claims directed to, *inter alia,* articles of clothing that absorb odors and methods of using the same. A copy of the '930 Patent is attached hereto as Exhibit B.

17. U.S. Patent No. 5,790,987, entitled "ODOR ABSORBING CLOTHING" issued from the PTO on August 11, 1998, to ALS as assignee from Sesselmann, with claims directed to, *inter alia,* articles of clothing that absorb odors. A copy of the '987 Patent is attached hereto as Exhibit C.

18. U.S. Patent No. 6,009,559, entitled "ODOR ABSORBING CLOTHING" issued from the PTO on January 4, 2000, to ALS as assignee from Sesselmann, with claims directed to, *inter alia,* articles of clothing that absorb odors. A copy of the '559 Patent is attached hereto as Exhibit D.

19. U.S. Patent No. 6,134,718, entitled "ODOR ABSORBING CLOTHING" issued from the PTO on October 24, 2000, to ALS as assignee from Sesselmann, with claims directed

to, *inter alia*, articles of cl thing that absorb odors. A copy of the '718 Patent is attached hereto as Exhibit E.

20. ALS purports, and has represented itself to be, the sole owner of the Sesselmann Patents.

General Allegations

21. On or about February 27, 1998, after extensive licensing negotiations, ALS granted Robinson a non-exclusive five-year license for the '236 Patent, '930 Patent, and all other U.S. Patents that issued and claimed priority under the '236 or the '930 Patents ("1998 Patent License Agreement") in consideration for the payment of royalties by Robinson Labs for, among other things, the commercial manufacture and sale of the patented odor-absorbing clothing and accessory packs.

22. Section 3.8 of the 1998 Patent License Agreement provides that "the parties agree to mutually support and promote each other's products." Section 3.8 specifically requires ALS to "insert a flyer or coupon in [its products] promoting [Robinson Labs'] Carbon Clothes Wash product."

23. ALS has not inserted flyers or coupons promoting Robinson Labs' Carbon Clothes Wash product, even though Robinson Labs provided a stock of flyers to ALS for this purpose.

24. ALS has not supported or promoted Robinson Labs' products in any way.

25. Although the 1998 Patent License Agreement was non-exclusive, Section 3.1 provided that ALS would not license certain entities to make odor-absorbing clothing for the 1998, 1999, or 2000 seasons.

26. Section 3.1 also provided that "the parties agree to discuss possible additional parties to be added to this listing and will review the scope of the license granted and the end of the third year of the Agreement, with the possibility of extending the exclusions noted above."

27. ALS did not discuss with Robinson Labs possible additional exclusions.

28. ALS did not review with Robinson Labs the scope of the license to consider extending the exclusions.

29. In 1999, Robinson Labs learned that ALS had licensed additional parties to sell odor-absorbing clothing.

30. When asked about the additional licenses, Mr. Sesselmann told Mr. Schulz, as he had on several occasions, that ALS would not offer any more licenses.

31. Upon information and belief, the statement by Mr. Sesselmann in the previous paragraph was untrue.

32. ALS has continued to enter additional license agreements after 1999.

33. Article VII of the 1998 Patent License Agreement provides, in part, "[i]n the event of potential infringement of one or more of the Patents, the parties agree to review the infringement and jointly evaluate the possible infringement claims."

34. In Fall 1998, Robinson Labs became aware that Whitewater Outdoors, Inc. and other companies were using fabric produced by W. L. Gore and Associates Inc., and selling scent eliminating clothing in the hunting apparel market.

35. Robinson Labs informed ALS of the potential infringement.

36. ALS notified Robinson Labs that it would handle the matter on its own without the participation of any of its Licensees.

37. ALS subsequently filed a patent infringement suit against Gore and Whitewater.

38. In response to questions from Robinson Labs concerning the suit, Mr. Sesselmann told Robinson Labs that neither Gore nor Whitewater would receive a license from ALS.

39. ALS settled the suit with Gore and Whitewater.

40. As a term of the settlement, ALS granted Gore and Whitewater licenses to produce odor-absorbing hunting apparel.

41. In response to questions concerning the suit, Mr. Sesselmann told Robinson Labs that ALS had received a significant monetary settlement in the Gore/Whitewater case.

42. Mr. Sesselmann told Robinson Labs that the settlement in the Gore/Whitewater case included treble damages.

43. Mr. Sesselmann told Robinson Labs that the court in the Gore/Whitewater case had upheld the validity of the patents.

44. In response to questions concerning the license to Gore and Whitewater, Mr. Sesselman told Robinson Labs that Gore and Whitewater were required to pay a substantial royalty.

45. In response to questions concerning the license to Gore and Whitewater, Mr. Sesselman told Robinson Labs that Robinson Labs had the best deal of any of the ALS licensees,

46. In response to questions concerning the license to Gore and Whitewater, Mr. Sesselman told Robinson Labs that Gore pays more royalties than Robinson Labs.

47. Upon information and belief, each Mr. Sesselman's statements cited in the previous paragraphs concerning the Gore/Whitewater suit, settlement and license were false, and Mr. Sesselmann knew they were false.

48. Upon information and belief, Mr. Sesselmann made the false statements intending to deceive Robinson Labs, and thereby inducing Robinson Labs to continue paying royalties without challenging the validity of the Sesselmann patents.

49. Since the inception of the 1998 Patent License Agreement, Robinson has satisfied its obligations thereunder, including the payment of substantial royalties to ALS, except that Robinson Labs has withheld the most recent royalty payment, in reliance on the notice and cure provisions of the 1998 Patent License Agreement.

First Cause of Action
(Invalidity of the '236 Patent)

50. Robinson Labs repeats, realleges, and incorporates by reference each of the allegations of Paragraphs 1 through 49 as if fully set forth herein.

51. The claims of the '236 Patent are invalid for failure to comply with one or more of the provisions of 35 U.S.C. §§ 102, 103, and 112.

52. Robinson Labs is entitled to a judicial declaration that the '236 Patent is invalid for failure to comply with one or more of the provisions of 35 U.S.C. §§ 102, 103, and 112.

53. Robinson Labs hereby reserves the right to assert additional invalidity challenges to the '236 patent after initiating and taking discovery in this matter.

Second Cause of Action
(Invalidity of the '930 Patent)

54. Robinson Labs repeats, realleges, and incorporates by reference each of the allegations of Paragraphs 1 through 53 as if fully set forth herein.

55. The claims of the '930 Patent are invalid for failure to comply with one or more of the provisions of 35 U.S.C. §§ 102, 103, and 112.

56. Robinson Labs is entitled to a judicial declaration that the '930 Patent is invalid for failure to comply with one or more of the provisions of 35 U.S.C. §§ 102, 103, and 112.

57. Robinson Labs hereby reserves the right to assert additional invalidity challenges to the '930 patent after initiating and taking discovery in this matter.

Third Cause of Action
(Invalidity of the '987 Patent)

58. Robinson Labs repeats, realleges, and incorporates by reference each of the allegations of Paragraphs 1 through 57 as if fully set forth herein.

59. The claims of the '987 Patent are invalid for failure to comply with one or more of the provisions of 35 U.S.C. §§ 102, 103, and 112.

60. Robinson Labs is entitled to a judicial declaration that the '987 Patent is invalid for failure to comply with one or more of the provisions of 35 U.S.C. §§ 102, 103, and 112.

61. Robinson Labs hereby reserves the right to assert additional invalidity challenges to the '987 patent after initiating and taking discovery in this matter.

Fourth Cause of Action
(Invalidity of the '559 Patent)

62. Robinson Labs repeats, realleges, and incorporates by reference each of the allegations of Paragraphs 1 through 61 as if fully set forth herein.

63. On information and belief, the claims of the '559 Patent are invalid for failure to comply with one or more of the provisions of 35 U.S.C. §§ 102, 103, and 112.

64. Robinson Labs is entitled to a judicial declaration that the '559 Patent is invalid for failure to comply with one or more of the provisions of 35 U.S.C. §§ 102, 103, and 112.

65. Robinson Labs hereby reserves the right to assert additional invalidity challenges to the '559 patent after initiating and taking discovery in this matter.

Fifth Cause of Action
(Non-infringement of '236 and '718 Patents)

66. Robinson Labs repeats, realleges, and incorporates by reference each of the allegations of Paragraphs 1 through 65 as if fully set forth herein.

67. Robinson Labs' manufacture and sale of its odor-absorbing clothing does not infringe the '236 or '718 Patents because the independent claims of those patents are not infringed.

68. As licensee of the '236 or '718 Patents, Robinson Labs is entitled to seek a declaration that its products do not infringe those patents.

69. Robinson Labs is entitled to a judicial declaration that its products do not infringe the '236 or '718 Patents.

Sixth Cause of Action
(Unenforceability of the '236, '930, '987, '559 and '718 Patents
Based on Inequitable Conduct)

70. Robinson Labs repeats, realleges, and incorporates by reference each of the allegations of Paragraphs 1 through 69 as if fully set forth herein.

71. On information and belief, the claims of the '236, '930, '987, '559 and '718 Patents are unenforceable due to inequitable conduct by ALS, its representative, or its attorney (collectively "ALS").

72. During prosecution of the applications that issued as the '236, '930, '987, '559, and '718 Patents, ALS has a duty to act with the utmost candor and good faith under 37 C.F.R. § 1.56(a).

73. This duty of utmost candor and good faith required that ALS disclose to the PTO all information known by it to be material to patentability of the '236, '930, '987, '559, and '718 Patents.

74. United States Military Specification MIL-S-43926H, and related versions thereof, (hereinafter "Military Art") teaches and discloses the same invention purportedly claimed in the '236 Patent. It establishes a prima facie case of unpatentability of one or more claims in the '236 Patent. Accordingly, the Military Art was highly material to patentability of the '236 Patent.

75. The Military Art was publicly available for at least a year before the priority date of the '236 Patent.

76. On information and belief, prior to issuance of the '236 Patent, ALS did not disclose the Military Art to the PTO examiner.

77. Because the Military Art was both highly material and publicly available at the time of ALS's filing of the initial application, a continuation of which issued as the '236 Patent. Robinson Labs believes that by not disclosing the Military Art, ALS intended to mislead or deceive the PTO examiner. In the absence of more direct evidence of ALS's intent to deceive or mislead the PTO examiner, Robinson Labs resorts to judicial process and the aid of discovery to confirm its belief as to ALS's knowledge and intent.

78. ALS's failure to disclose the highly material Military Art to the PTO examiner, with the intent to mislead and deceive the PTO examiner into allowing the claims of the '236 Patent to issue, constitutes inequitable conduct rendering the '236 and all the Sesselmann Patents in their entirety unenforceable against Robinson Labs.

79. Robinson Labs is entitled to a judicial declaration that the '236, '930, '987, '559, and '718 Patents are unenforceable due to inequitable conduct by ALS.

Seventh Cause of Action
(Unenf rceability of the '236, '930, '987, '559 and '718 Patents Based on Patent Misuse)

80. Robinson Labs repeats, realleges, and incorporates by reference each of the allegations of Paragraphs 1 through 79 as if fully set forth herein.

81. On information-and-belief, the claims of the '236, '930, '987, '559 and '718 Patents are unenforceable due to on-going patent misuse by ALS.

82. By virtue of the definition of Licensed Products in Section 1.1 of the 1998 Patent License Agreement, ALS has exacted royalties from Robinson Labs for making, using or selling products that would not infringe the Sesselmann Patents.

83. ALS has provided no additional consideration to Robinson Labs to support an agreement by Robinson Labs to pay royalties on goods that would not infringe the Sesselmann patents.

84. By virtue of the provisions related to termination in Sections 2.1, 3.3 and Article VII, ALS has attempted to enforce its patent monopoly beyond the terms of the Sesselmann Patents.

85. ALS has provided no additional consideration to Robinson Labs to support an agreement by Robinson Labs to forego from making, using or selling products that embody the inventions claimed in the Sesselmann patents after the Sesselmann patents have expired or been invalidated.

86. The restrictions sought to be imposed on Robinson Labs making, using or selling goods that would not infringe the Sesselmann patents are unlimited in duration or geographic territory.

87. Robinson Labs is entitled to a judicial declaration that the '236, '930, '987, '559, and '718 Patents are unenforceable due to patent misuse by ALS.

Eighth Cause of Action
(Breach of Contract)

88. Robinson Labs repeats, realleges, and incorporates by reference each of the allegations of Paragraphs 1 through 87 as if fully set forth herein.

89. ALS has breached the 1998 Patent License Agreement by failing to act in good faith.

90. ALS has breached the express terms of the 1998 Patent License Agreement:

A. by failing to discuss with Robinson Labs possible parties to be added to the list of parties that ALS would not license, and by failing to review the scope of the license at the end of the third year with the possibility of extending those exclusions, as required by Section 3.1 of the 1998 Patent License Agreement;

B. by failing to support and promote Robinson Labs' products, by, among other things, failing to include with its products fliers or coupons promoting Robinson Labs' Carbon Clothes Wash, as required by Section 3.8 of the 1998 Patent License Agreement; and

C. by failing to review with Robinson Labs acts of infringement known by ALS and by failing to jointly evaluate with Robinson Labs possible infringement claims, all as required by Article VII of the 1998 Patent License Agreement.

91. As a result of these breaches by ALS, Robinson Labs is entitled to recover damages, which are not yet specifically determined, but would include the recovery of royalties accrued prior to the date of this suit.

Ninth Cause of Action
(Misrepresentation)

92. Robinson Labs repeats, realleges, and incorporates by reference each of the allegations of Paragraphs 1 through 91 as if fully set forth herein.

93. ALS has made statements of fact to Robinson Labs that, upon information and belief, have been untrue, including:

A. multiple statements during 1999 and 2000 that ALS would not offer additional licenses that would permit other entities to make and sell odor-eliminating clothing;

B. that the validity of the Sesselmann patents had been upheld by the court in the Gore/Whitewater case;

C. that ALS had received a substantial monetary settlement, including treble damages, in the Gore/Whitewater case; and

D. that Gore had been licensed by ALS and that Gore pays more royalties than Robinson Labs.

94. ALS knew that these statements were false and intended that Robinson Labs would act, or refrain from acting, because of them.

95. Robinson Labs relied on these false statements of fact to its detriment, by, among other things, foregoing or delaying a legal challenge to the Sesselmann patents.

96. Robinson Labs is entitled to recover damages, which are not yet specifically determined, but would include the recovery of royalties accrued prior to the date of this suit.

WHEREFORE, Robins n Labs respectfully prays for judgment in its favor and against ALS:

(a) Declaring each of the claims of the '236, '930, '987, and '559 Patents invalid;

(b) Declaring each of the claims of the '236, '930, '987, '559 and '718 Patents unenforceable;

(c) Declaring each of the claims of the '236, '987, and '718 Patents not infringed by Robinson Labs.

(d) Awarding Robinson Labs damages caused by ALS's misrepresentations and breaches of the 1998 Patent License Agreement;

(e) Awarding Robinson Labs reasonable attorneys fees and costs of this Complaint under 35 U.S.C. § 285; and

(f) Awarding Robinson Labs such other and further relief as the Court may deem just and proper.

Jury Demand

Robinson Labs demands a trial by jury on all issues so triable.

Dated at Grand Rapids, Michigan, this 24th day of December, 2001.

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C

Dated: December 24, 2001

Richard A. Gaffin
Attorneys for Plaintiff
99 Monroe, N.W., Suite 1200
Grand Rapids, MI 49503
Phone: (616) 454-8656
Fax: (616) 776-6322

LA FOLLETTE GODFREY & KAHN

Eugenia G. Carter
James D. Peterson
Charles M. Leeck
Attorneys for Plaintiff
One East Main Street
P.O. Box 2719
Madison, WI 53701-2719
Phone: (608) 257-3911
Fax: (608) 257-0609

LaFollette Godfrey & Kahn is an office of Godfrey & Kahn, S.C.

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UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WISCONSIN

ALS ENTERPRISES, INC.
821 West Western Avenue
Muskegon, Michigan 49441,

Case No. 99C 700 S

Plaintiff
and Counterclaim Defendant

v.

WHITEWATER OUTDOORS, INC.
W4228 Church Road
Hingham, Wisconsin 53031,

and

W.L. GORE & ASSOCIATES, INC.
551 Paper Mill Road
Newark, Delaware 19714-9206

Defendants and Counterclaimants.

AMENDED ANSWER TO SECOND AMENDED COMPLAINT, AFFIRMATIVE DEFENSES AND COUNTERCLAIM OF DEFENDANT W.L. GORE & ASSOCIATES, INC.

Defendant, W.L. GORE & ASSOCIATES, INC., ("Gore"), through counsel, propounds the following Amended Answer to the Second Amended Complaint herein, on a paragraph by paragraph basis corresponding to the numbered paragraphs of the Second Amended Complaint:

1. Gore admits that the action asserts infringement of the four named patents but otherwise denies the allegations of paragraph 1.

2. Gore admits the allegations of paragraph 2.

3. Gore denies the allegations of paragraph 3.

4. Gore lacks information sufficient to form a belief and therefore denies the allegations of paragraph 4.

5. Gore admits the allegations of paragraph 5.

6. Gore admits the allegations of paragraph 6.

7. Gore admits the first sentence of paragraph 7. Gore denies the second sentence of paragraph 7, at least because no invention is contained in the '236 patent, and hence there can be no "inventor".

8. On information and belief, Gore denies the allegations of paragraph 8.

9. Gore denies the allegations of paragraph 9.

10. On information and belief, Gore denies the allegations of paragraph 10.

11. Gore denies the allegation of paragraph 11.

12. Gore denies the allegation of paragraph 12.

13. Gore admits the first sentence of paragraph 13. Gore denies the second sentence of paragraph 13, at least because no invention is contained in the '930 patent and hence there can be no "inventor".

14. On information and belief, Gore denies the allegations of paragraph 14.

15. Gore denies the allegations of paragraph 15.

16. On information and belief, Gore denies the allegations of paragraph 16.

17. Gore denies the allegations of paragraph 17.

18. Gore denies the allegations of paragraph 18.

19. Gore admits the first sentence of paragraph 19. Gore denies the second sentence of paragraph 19, at least because no invention is contained in the '987 patent and hence there can be no "inventor."

20. On information and belief, Gore denies the allegations of paragraph 20.

21. Gore denies the allegations of paragraph 21.

22. On information and belief, Gore denies the allegations of paragraph 22.

23. Gore denies the allegations of paragraph 23.

24. Gore denies the allegations of paragraph 24.

25. Gore admits the first sentence of paragraph 25. Gore denies the second sentence of paragraph 25, at least because no invention is contained in the '559 patent and hence there can be no "inventor."

26. On information and belief, Gore denies the allegations of paragraph 26.

27. Gore denies the allegations of paragraph 27.

28. On information and belief, Gore denies the allegations of paragraph 28.

29. Gore denies the allegations of paragraph 29.

30. Gore denies the allegations of paragraph 30.

AFFIRMATIVE DEFENSES

By and for affirmative defenses herein, Gore avers as follows:

31. Each of the '236, '930, '987 and '559 patents is invalid for violation of one or more of the provisions of 35 U.S.C. §§ 101, 102, 103, 112 and 132.

32. On information and belief, each of the '236, '930, '987 and '559 patents was procured from the United States Patent and Trademark Office ("PTO") through inequitable conduct including, without limitation, the withholding of material prior art with the intent to deceive the PTO, and the submission to the PTO of material false and misleading statements and declarations relating to the state of the pertinent art and to determination of obviousness under 35 U.S.C. § 103. Prior art intentionally withheld includes, inter alia, the public knowledge and use by hunters in the United States of clothing with odor eliminating agents and/or various odor absorbing agents such as baking soda, and the marketing of chemical warfare and other protective suits for use by hunters. False and/or misleading information submitted to the PTO include applicant's allegations that the claimed subject matter has enjoyed commercial success, fulfills a long-felt need and has been practiced. As a result, those patents and any subsequent patents based thereon are unenforceable due to inequitable conduct.

33. On information and belief, plaintiff's asserted patents are unenforceable because of patent misuse. Plaintiff, inter alia, has sought to extend the scope of those patents to unlawfully restrict the sale of products not covered by those patents, including, without limitation, unpatented textile fabrics and individual articles of clothing, and plaintiff further has used the

aforesaid patents to require the acceptance of certain trademark restrictions and for certain improper marking restrictions and/or the purchase of unpatented components from plaintiff's designated source(s) of supply.

34. Plaintiff's assertion of the four patents against Gore is a further manifestation of its efforts to misuse the patents to improperly restrict the sale of products not reasonably within the ambit of coverage of those patents.

35. With respect to sales to Whitewater and its customers, Gore have not violated 35 U.S.C. § 271 and have not unlawfully infringed or induced others to infringe any of the Plaintiff's asserted four patents because, on information and belief, Whitewater possesses a license under said patents.

36. This is an extraordinary case within the meaning of 35 U.S.C. § 285 because it was brought in bad faith, without color of right, and further, because it is based upon patents that are unenforceable due to patent misuse and inequitable conduct.

COUNTERCLAIM

By and for its Counterclaim against plaintiff and counterclaim defendant ALS, Gore avers as follows:

COUNT 1 – DECLARATORY JUDGMENT: PATENT RELIEF

37. This count of the counterclaim seeks a declaration of patent invalidity, non-infringement and unenforceability with respect to each of the '236, '930, '987 and '559 patents. Plaintiff has alleged that Gore has unlawfully induced infringements of one of more claims of the

'236, '930, '987 and '559 patents because of the sale of odor suppressing clothing made with Gore's WINDSTOPPER SUPPRESCENT fabric. Jurisdiction is proper under 28 U.S.C. § 2201 et seq. and 28 U.S.C. § 1338(a).

38. Each claim of the '236, '930, '987 and '559 patents is invalid for violation of one or more of the requirements for patentability of 35 U.S.C. §§ 101, 102, 103, 112 and 132.

39. Each of the '236, '930, '987 and '559 patents is unenforceable due to inequitable conduct because, on information and belief, each of Plaintiff's asserted four patents was procured from the United States Patent and Trademark Office through the intentional use of material false and/or misleading information and/or by the intentional withholding of material information for the reasons stated above in paragraph 32.

40. On information and belief, each of the '236, '930, '987 and '559 patents is unenforceable because of patent misuse. Plaintiff, inter alia, has sought to expand the scope of those patents to unlawfully restrict the sale of products not covered by those patents, including, without limitation, unpatented textile fabrics and individual articles of clothing sold by themselves, and plaintiff, further, has used the aforesaid patents to require the acceptance of certain trademark restrictions and certain improper marking restrictions and/or the purchase of unpatented components from plaintiff's designated source(s) of supply.

41. Plaintiff's assertion of the four patents against Gore is a further manifestation of its efforts to misuse the patents to improperly restrict the sale of products not even reasonably within the ambit of coverage of those patents.

42. Gore does not infringe or induce others to infringe and does not contributorily infringe any claim of any of the '236, '930, '987 and '559 patents.

COUNT 2 – FALSE MARKING

43. This is a claim against counterdefendant ALS for false marking of articles in violation of 35 U.S.C. § 292. Jurisdiction is proper pursuant to 35 U.S.C. § 1338(a).

44. Upon information and belief, plaintiff and those in active concert and/or privity with plaintiff and/or acting at the behest of plaintiff, in violation of 35 U.S.C. § 292, marked upon, affixed to, and/or used in advertising in connection with unpatented articles, at least, U.S. Patent Nos. 5,383,236 and 5,539,930, for the purpose of deceiving the public into believing that the said marked articles were patented.

45. The number of individual unpatented articles so marked has, on information and belief, has not been insubstantial.

46. Gore, as a member of the public is entitled to receive one half of the statutory fine assessed against ALS for each unpatented article that it falsely marked and required others to falsely mark.

COUNT 3 – VIOLATION OF SECTION 43(A) OF THE LANHAM ACT

47. This count of Gore's counterclaim seeks damages and injunctive relief against counterdefendant ALS for violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B). Jurisdiction is proper under 28 U.S.C. § 1338(a).

48. Counterclaimant Gore manufactures and sells a fabric product in interstate commerce under its trademark WINDSTOPPER SUPPRESCENT. Gore sells that fabric product to different customers who fabricate it into various articles of clothing pursuant to their own patterns and specifications.

49. Both orally and in writing during promotional activities, and in commercial advertising, ALS, its agents, servants and employees, and those in active concert with them and at its behest, have misrepresented the nature, characteristics and qualities of Gore's SUPPRESCENT WINDSTOPPER fabrics and of products made therefrom. This misrepresentation is likely to deceive and likely to have deceived a substantial segment of potential customers and users of Gore's fabrics and products.

50. Both orally and in writing during promotional activities, and in commercial advertising, ALS, its agents, servants and employees, and those in active concert with it, have marked and required others to mark unpatented articles sold in interstate commerce with at least, U.S. Patent Nos. 5,383,236 and 5,539,930.

COUNT 4 – UNFAIR COMPETITION

51. This count of Gore's counterclaim seeks damages and injunctive relief against counterdefendant ALS for unfair competition under the common law and under the laws of Wisconsin, specifically Wis. Stat. § 100.18(1). Jurisdiction of this Court is proper under the pendent jurisdiction provisions of 28 U.S.C. § 1338(b).

52. On information and belief, ALS has brought this action, specifically alleging infringement of the '236, '930, '987, and '559 patents, without color of right, and for the purpose

of interfering with and impeding Gore's ability to market Gore's WINDSTOPPER SUPPRESCENT fabric in competition with fabrics whose sales are controlled by ALS through its designated suppliers or alleged licensees.

53. ALS has also made untrue, deceptive or misleading statements to the public about the nature, characteristics and qualities of Gore's WINDSTOPPER SUPPRESCENT fabric and of products made therefrom, and ALS has made untrue, deceptive or misleading statements to the public about the nature, characteristics and qualities of its competing fabrics and products, including those fabrics and products controlled by ALS, through its designated suppliers or purported licensees, to promote the sales of ALS-controlled fabrics and products and to minimize or prevent Gore's sales of fabrics and resulting products.

54. Counterdefendant ALS' conduct herein complained of is likely to continue and cause irreparable injury unless enjoined by this Court.

WHEREFORE, defendant-counterclaimant Gore seeks relief as follows:

(a) Dismissing the complaint with prejudice and awarding Gore its costs and attorneys' fees in accordance with the provisions of 35 U.S.C. § 285;

(b) Declaring of each of the claims of the '236, '930, '987 and '559 patents invalid, not infringed by Gore and unenforceable;

(c) Finding that ALS is guilty of false marking and fining it $500 for each and every article found to have been falsely marked, half of the sum to be awarded to Gore and the balance to the U.S. Treasury, in accordance with the provisions of 35 U.S.C. § 292;

(d) Finding that ALS has violated § 43(a) of the Lanham Act by disparagement of Gore's products, and/or by falsely marking products and requiring others to falsely mark products, enjoining continued violation and awarding to Gore its damages and ALS' profits for such acts and its reasonable attorneys' fees pursuant to 15 U.S.C. § 117(a);

(e) Finding that counterdefendant ALS has committed acts of unfair competition, enjoining those acts and awarding to Gore its actual damages caused by such acts and such punitive damages as the jury may award;

(f) Awarding such other and further relief that this Court may deem just and proper.

Dated: February 23, 2000

LA FOLLETTE GODFREY & KAHN

By Eugenia G. Carter

BRADY C. WILLIAMSON
State Bar No. 1013896
EUGENIA G. CARTER
State Bar No. 1011447
One East Main Street
P.O. Box 2719
Madison, WI 53701-2719
(608) 257-3911

Attorneys for Defendant

OF COUNSEL:

DAVID H. PFEFFER
ARNOLD I. RADY
MORGAN & FINNEGAN, L.L.P.
345 Park Avenue
New York, NY 10154
(212) 758-4800

JOHN S. CAMPBELL
GARY A. SAMUELS
W.L. GORE & ASSOCIATES, INC.
Legal Department
551 Paper Mill Road
Newark, Delaware 19714-9206
(302) 738-4880

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